KSM INSURAN BHD. v. ONG AH BA & ANOR.

[O.C.J. (George J.) November 16 & 27, 1984]

[Kuala Lumpur – Civil Suit No. C 550 of 1981]

Agency – Arbitration clause in agency agreement – Claims not disputed on merits – Existence of arbitration clause no bar to court action.

Arbitration – Arbitration clause in agency agreement – No bar to court action in undisputed claims.

In this case the first defendant was an agent of the plaintiff Insurance Company. He owed to the company $40,252 in respect of business transacted by him. The second defendant was a guarantor. The plaintiff filed a claim against the first and second defendant. The writ could not be served on the defendants and was eventually served by substituted service by posting a copy of the writ on the door of the addressees. Judgment in default of appearance was entered against the first defendant. Later he applied to the court for setting aside the default judgment on the ground that he was a business man and was away from home most of the time. He also referred to the arbitract in clause in the agreement which precluded bringing any action of suit in the court without first resorting to arbitration.

Held, dismissing the first defendant's application: (1) no explanation had been given by the first defendant as to why he had not entered an appearance in time;

(2) the first defendant has not contended that the amount claimed against him is in fact not owing;

(3) the first defendant has not shown that there has been any dispute or difference between the plaintiff and him.

Case referred to:

(1) *London and North Western Railway* v. *Jones* [1915] 2 K.B. 35.

CIVIL SUIT.

Gurdial Singh for the first defendant/applicant.
Ramesh Abraham for the plaintiff/respondent.

Cur. Adv. Vult.

George J. : The plaintiff is an insurance company. It caused a writ to issue against the defendants on May 21, 1981 claiming the sum of $40,251.89 alleged to be the balance due by the 1st defendant to the plaintiff in respect of insurance business transacted by or through the 1st defendant on behalf of the plaintiff. As against the 2nd defendant the claim is as guarantor for the due performance of the agency agreement by the 1st defendant. The defendants had given their addresses as being in the town of Bidor, the 1st defendant when he entered into the agency agreement and the 2nd defendant when he provided the written letter of guarantee. The affidavits pertaining to the attempts to serve the writ on the defendants show that in fact the defendants continued to reside at the said addresses respectively but were not available each time the process server called at the said addresses. Eventually the plaintiff obtained leave to have the writ served by substituted service, *inter alia*, by posting a copy of the writ on the door of each of the said addresses. Affidavits of service showed that this was done. The 2nd defendant appears to have engaged M/s. Gurdial Singh & Co., Advocates & Solicitors of Ipoh to act for him and has taken issue against the plaintiff's claim. I see from the file that the state of the action as against the 2nd defendant is that on November 13, 1984 directions were given pursuant to an Order 25 summons for directions taken out by the plaintiff against the 2nd defendant.

As for the 1st defendant, judgment in default of appearance was entered against him on December 9, 1981. Nothing had been done for or on behalf of the 1st defendant until he purported through the same firm of advocates and solicitors, M/s. Gurdial Singh & Co., to enter a conditional appearance on June 27, 1984.

Enclosure (41) is the 1st defendant's application dated July 16, 1984 seeking, *inter alia*, orders that the default judgment entered against him on December 9, 1981 be set aside and the writ and statement of claim against him be set aside. This application was supported by the 1st defendant's affidavit affirmed on July 5, 1984. In the affidavit the 1st defendant says that "I lately came to know that Judgment in Default of Appearance was obtained against me ..." He states that he is a businessman and was away from home most of the time. He then refers to the arbitration clause in the agency agreement which provides that where any dispute or difference shall arise between the parties, the condition precedent to bringing any action or suit would be the obtaining of an award by an arbitrator.

The 1st defendant does admit in his affidavit that he resides at the very address at Bidor given in the agency agreement. It is seen from the affidavit of the process server that it was at that address that various attempts to effect personal service of the writ had been made and that eventually a copy of the writ had been posted onto its front door.

No explanation has been given by the 1st defendant as to why he had not entered an appear-

ance in time. That omission alone was sufficient for me to decide to dismiss the application. In any event the 1st defendant has not shown that he has any defence on merits. Invoking the arbitration clause does not provide the 1st defendant with a defence in that he has not shown that there has been any dispute or difference between the plaintiff and him. He has not contended that the amount claimed against him is in fact not owing.

In *London and North Western Railway* v. *Jones*,[1] Rowlatt J. said:

"It is now quite clear from the decisions in *London and North Western Ry. Co.* v. *Donellan*, and *Midland Ry. Co.* v. *Loseby* that if there is a difference of any kind arising under the section before action, that matter must be decided by arbitration and the Courts have no jurisdiction to determine that difference. It does not, however, follow that the Courts cannot be resorted to without previous recourse to arbitration to enforce a claim which is not disputed but which the trader merely persists in not paying. This much at any rate is clear from the decision in the House of Lords in *London and North Western and Great Western Joint Ry. Cos.* v. *Billington*, where the company did obtain judgment in the Courts although there had been no arbitration. If that case proceeded upon the basis that, as upon the findings of the county court judge the defendant had accepted the services with full knowledge of what was charged without contesting their reasonableness, he could not be heard to say that there was any difference and must be treated as having agreed the charges in spite of the fact that he protested he would not pay, no difficulty arises. It may be, however, that though no difference has arisen before action in the shape of a demand made and challenged, it cannot be shown on the other hand that the demand has been agreed to."

The learned editors of *Russell* on Arbitration 17th Edition cited the aforesaid judgment of Rowlatt J. in support of their contention that "Mere refusal to pay upon a claim which is not really disputed does not necessarily give rise to a 'dispute' calling an arbitration clause into operation."

The application had to be and was dismissed with costs.

Application dismissed.

Solicitors : *Gurdial Singh & Co.; Shook Lin & Bok.*

KOH SIAK POH v. PERKAYUAN O.K.S. SDN. BHD.

[O.C.J. (George J.) November 16 & December 19, 1984]

[Kuala Lumpur – Civil Suit No. C 2103 of 1984]

Contract – Contract for felling logs – Breach of contract – Application for specific performance and injunction – Application to set aside injunction.

In this case the Kelantan State Economic Development Corporation (SEDC) granted a timber concession to the defendants (OKS) who in turn entered into an agreement with the plaintiff (contractor) to fell logs and remove timber from particular portions of the concession. On July 9, 1984 the contractor caused the writ to issue against OKS for the following claims:

(1) An order for specific performance by the defendants of the terms and conditions of the agreement.

(2) Defendants be restrained by injunction from removing or selling timber felled by the plaintiff without the previous written consent of the plaintiff.

(3) Damages, cost and further or other relief.

The plaintiff caused a Summons-in-Chamber to be issued and with the aid of a certificate of urgency had it heard *ex parte* and an injunction was issued in terms of the prayer of the plaintiff coupled with an order that the defendants be restrained from moving or in any way dealing with about 1800 tons of cut timber lying at the Railway Station yard at Gua Musang until further order of Court.

The defendants did not enter appearance within the usual eight days and the plaintiff obtained an order from the court to move and deal with the cut timber lying in Gua Musang Railway Station. The plaintiff took possession of and sold the timber.

Three days later the defendants filed their application and asked for the interim injunction to be set aside and for damages. The grounds on which the defendants rely were not set out in the summons as is required by the Rules (Order 32 rule 1 and Form 62).

Held: (1) under the terms of the contract it was for the plaintiff to fell log and remove timber from the contract area. Since the plaintiff had already taken possession of the timber and sold it, setting aside that part of the order restraining the defendants from moving or dealing with that timber serves no purpose;

(2) so long as the contract subsists, there is no reason for the defendants to complain that they are restrained from committing breaches of it.

CIVIL SUIT.

Dominic Puthucheary (*K.Y. Foo* with him) for the defendants/applicants.

Mahinder Singh Dulku for the plaintiff/respondent.

Cur. Adv. Vult.